IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975
No. 75-546

GEORGE V. H. KLEIFGEN,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

KERMITT L. WATERS
PATRICK R. DOYLE, of Counsel
323 Las Vegas Blvd. South
Las Vegas, Nevada 89101
Counsel for Petitioner

I N D E X

TABLE OF CASES

STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

IN THE
SUPREME COURT OF THE UNITED STATES
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GEORGE V. H. KLEIFGEN,)
)
Petitioner,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Respondent.)

PETITION FOR A WRIT OF CERTIORARI

Petitioner, George V. H. Kleifgen, through his counsel prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in the case of U.S. v. George V. H. Kleifgen, case No. 74-3179.

OPINIONS BELOW

The United States District Court convicted the Defendant without opinion and entered judgment on the 17th day of June, 1974, Appendix A-1. The Court of Appeals on July 17, 1975, affirmed the judgment of the District Court without opinion, Appendix A-2. The Court of Appeals granted leave for Petitioner to file an untimely Petition for Rehearing on September 5, 1975, Appendix A-3. On September 19, 1975, Petitioner tendered an over-sized Petition for Rehearing to the Clerk of the Circuit Court, together with a Motion for leave to file said over-sized Petition for Rehearing. On the 30th day of September, 1975, the Ninth Circuit Court of Appeals denied Petitioner's Motion for

leave to file an over-sized Petition for Rehearing but stayed the entry of the mandate pending filing of a Petition for a Writ of Certiorari in the United States Supreme Court until October 9, 1975, Appendix A-4.

JURISDICTION

The Circuit Court of Appeals for the Ninth Circuit Affirmed the judgment of the District Court without opinion on the 17th day of July, 1975. Thereafter, by order of September 5, 1975, the Ninth Circuit Court of Appeals granted Petitioner leave to file an untimely Petition for Rehearing until September 19, 1975 and stayed the mandate. On September 30, 1975, the Court of Appeals denied Petitioner's motion for leave to file an over-sized Petition for Rehearing and granted Petitioner until October 9, 1975, in which to file a Petition for a Writ of Certiorari in this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), 62 Stat. 929.

QUESTION PRESENTED

Should the Court of Appeals reverse on the plain error rule when it appears patently obvious from the record that a criminal defendant has had ineffective assistance of counsel?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18 Sec. 1001. Statements or entries generally

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulant statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Title 18, Federal Rules of Criminal Procedure, Rule 52(b) "Plain Error"

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

CONSTITUTION PROVISIONS INVOLVED

United States Constitution, Amendment IV

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

United States Constitution, Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioner, a medical doctor, was convicted of nine counts in violation of Title 18 U.S.C. 1001 in the United States District Court for the District of Nevada sitting at Las Vegas, Nevada,on June 14, 1974, and committed to the custody of the Attorney General for a period of three years as to each count to run concurrently. Motion for new trial was denied on August 16, 1974.

Petitioner was charged with submitting, or causing to be submitted, false statements in the form of a "Request for Medical Payment Insurance Benefits Social Security Act Forms SSA-1490", which were forms signed by Medicare patients for medical treatments.

Following the judgment and sentence the Petitioner, a layman, in order to preserve any rights whatever, found it necessary to file his own appeal. Petitioner's trial counsel prosecuted the

appeal and upon consideration the Court of Appeals for the Ninth Circuit summarily affirmed for lack of a satisfactory issue.

The decision of the Court of Appeals was entered on July 17, 1975, and the mandate was issued August 17, 1975. Petitioner was first notified of the Appeal decision on August 20, 1975, after he had been ordered to surrender himself to the U.S. Marshall on August 27, 1975.

Present counsel entered the case on August 26, 1975, and procured a stay until September 19, 1975, in order to file an untimely petition for rehearing. Counsel filed a motion for leave to file an oversized petition for rehearing with suggestion for rehearing en banc and the proposed petition.

In said proposed petition counsel attempted to get before the Court the real issues presented by the case which were either lost or not presented by previous counsel. The requested relief included a request for remand for further fact finding in the alternative to a new trial.

The motion was denied by order on September 30, 1975, which provided for a stay until October 10, 1975, pending filing, consideration and disposition by the Supreme Court of the United States of a Petition for Writ of Certiorari provided such petition is filed in the Clerk's Office on or before October 9, 1975, and additionally, providing that the stay would continue pending the final disposition by the Supreme Court, a copy of the Order has been attached as Appendix A-4.

Present counsel, upon assumption of this case, found that his petitioner is a politically active and a highly controversial physician who resided and practiced medicine in Las Vegas, Nevada, from 1958 until 1973. Petitioner's political anti-Income Tax stand and criticisms of the actions of the Federal Government have spread across the United States through speaking engagements to groups and members of various political organizations.

In 1960 , Petitioner was charged in Las Vegas, Nevada, with two separate criminal abortion actions. One charge was dismissed and one charge resulted in an acquittal. The matter resulted in major adverse newspaper publicity.

In 1965, the State District Attorney in Las Vegas, Nevada, attempted to indict Petitioner with a criminal abortion charge with the result of a "no bill" by the State Grand Jury.

In 1960, the State District Attorney attempted to criminally charge Petitioner with prescribing unnecessary prescriptions, but the State Grand Jury again refused to indict Petitioner. As a result the District Attorney charged Petitioner on an "Information" with prescribing unnecessary prescriptions since the State Grand Jury had refused to indict Petitioner. The charges were immediately dismissed by the State Court. This proceeding resulted in further adverse newspaper and television publicity.

On August 16, 1973, at approximately 5:00 p.m., the United States Agents from

the Alcohol, Tobacco and Firearm Divisions of the Treasury Department, equipped with two helicopters, multiple metro police vehicles, together with newspapers and television reporters, approached Petitioner's house in search of so-called "Illegal Guns". Said search was made on affidavit of Robert Smith, a Special IRS Agent.

No "Illegal Guns" were found, only spectacular harmful newspaper and television coverage occurred resulting in injury to Petitioner's reputation.

Petitioner then sued the United States for invasion of privacy and for civil rights denials in Federal Court in Nevada.

Thereafter, after all the above hostile newspaper and television publicity, Petitioner was indicted (August, 1973) and convicted in March, 1974, on the charges of filing false claims with the United States.

In light of this background, the record discloses the following obvious deficiencies in representation and failure to preserve issues that can be observed from a plain reading of the record:

1. Counsel failed to move for suppression of evidence on the grounds of unreasonable search and seizure, contrary to the Fourth Amendment, even though the evidence was procured through consent obtained by the fraud and deceit of a Federal Agent (see Appendix B). The items in said seizure included a major part of the government's case (see Exhibits 22, p. 135,

23, p. 136 and 32, p. 135, in record below) because they were the only reliable evidence that proved the medical services were not performed.

2. After filing a motion to suppress under Miranda, counsel did not later object to the introduction of such tainted evidence at the trial or raise the issue on appeal (T. p. 135 and 136).

3. In light of the admitted high publicity and notorious background, (see voir dire T. p. 1 through 50), counsel failed to present any motion for change of venue.

4. Counsel failed to move to quash the jury panel after it became apparent that the panel was not a reasonable representation of Petitioner's peers; and that virtually all of the members of this panel were familiar not only with past charges made against Petitioner, but also with news media coverage of the case on which they would be sitting (see Appendix C).

5. Counsel failed to voir dire jurors, request to voir dire jurors or present any suitable questions to the judge such as to inquire into obvious areas of bias.

6. Counsel failed to object to any jurors for cause even though a check of the panel revealed the following (as shown in Appendix D):

(1) a former patient of Petitioner's who was hostile;

(2) a former court martial board officer, who sat on several previous military court martials;

(3) a juror whose daughter was a secretary to the Nevada Attorney General, Robert List, and whose other daughter was married to a policeman;

(4) an architect, an accountant and the wife of a physician together with other jurors who had sat on several previous Federal criminal jury trials in Las Vegas; who knew the prosecution attorney and one of the witnesses from previous Federal jury duty in which they had sat;

(5) three members of the jury that had sat together on a previous Federal criminal fraud trial in which they had found the defendant guilty.

7. Counsel failed to object to the admission of 41 separate objectionable exhibits (Appendix E).

8. Counsel failed to object to so much hearsay at the trial that the trial judge recessed and called Petitioner's counsel in chambers to inquire about his motive (RT. p. 101, line 2 through 12, and RT. p. 737, line 11 through 14).

9. Counsel did not make any opening statement.

10. When the government put in its case in chief evidence opposing Petitioner's potential defenses which was

only proper as rebuttal, counsel failed to object.

11. Counsel failed to determine a constitutional challenge to the jury panel was available on the ground of systematic exclusion of over 40% of the total adult population thereby excluding the most of many classes of people including Negroes, Mexican-Americans, and American Indians as shown in Appendix F.

12. Counsel failed to object to an almost four-year unnecessary pre-accusation delay on constitutional due process grounds rather than Rule 48B when the prevailing case law holds that pre-accusation delay is not a Rule 48B matter. Counsel further failed to make a record showing prejudice when said delay caused the inability of defense to find a key defense witness, Jan Hamer, aka Nelma Lockhart (Appendix G). Counsel failed to determine whether said delay caused the loss of other potentially favorable defense witnesses.

13. Counsel did not timely attempt to subpoena key defense Jan Hamer, aka Nelma Lockhart.

14. Counsel made motion for a new trial on grounds of newly discovered evidence when key witness, Jan Hamer, aka Nelma Lockhart, was discovered after the close of the trial, but failed to state in the motion what the evidence was and also failed to adequately preserve and raise the matter on appeal.

15. Counsel attempted to introduce for impeachment, Exhibit AA, without establish-

ing a rudimentary foundation for impeachment. The point was raised on appeal without any record to support the claim for error.

REASONS FOR GRANTING THE WRIT

1. ANY FEDERAL COURT SHOULD HALT THE PROCEEDING AND GRANT A NEW TRIAL AT ANY TIME IT APPEARS PATENTLY OBVIOUS ON THE RECORD THAT A CRIMINAL DEFENDANT IS BEING DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

We believe this case has national importance because of the fundamental nature of the deprivation, lack of effective assistance of counsel. It goes to the citizen's very ability to cope with the criminal process.

All Federal Courts from the District Court to the Supreme Court have the power and duty to grant a new trial upon discovery of plain error. Rule 52 (b), Federal Rules of Criminal Procedure; United States v. Memoli (9th Cir. 1971), 449 F2d 160; U.S. v. Lewis (7th Cir. 1973), 484 F2d 734; U.S. v. Hazeltine (10th Cir. 1971), 444 F2d 1382; U.S. v. Morales (5th Cir. 1973), 477 F2d 1309; United Brotherhood, C.O. v. United States (1967), 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973; Fisher v. U.S. (1946), 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed 1382, 166 ALR 1176; Silber v. U.S. (1962) 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798. The duty to preserve any persons right to a fair trial ultimately falls upon the courts.

It is our contention that when effective assistance of counsel is in question, the duty of diligence upon the courts is even greater because it concerns the break down of the very agency provided to protect the rights of a citizen on trial in a vigorously competitive adversary system. If his counsel goes awry the layman has little chance against an able prosecutor and may never be aware that his counsel lacked or did not exercise reasonable competence unless it is noticed by the court. Both the District and Appeals Courts should examine the record to see if the citizen has minimally effective counsel. Many defendants are ignorant regarding courts and depend on those who hold themselves out as lawyers. The Court, through its Chief Justice, has recently expressed concern over the problem of an adequate trial bar. Those not learned in the law often have no recourse except for the diligence of the Court.

It is only through his counsel that a citizen can make an informative complaint. In other words, the agency that would provide his only tool to vindicate a constitutional deprivation is creating the deprivation. The matter will never become an item for new trial in the trial court or the subject of an appeal until he has new counsel or it is noticed by the court. It has to be a suitable subject for the plain error rule. Otherwise, would be a "Catch 22" situation. The citizen would have to be able to properly raise a point in order to have relief from being deprived of his ability to properly raise points. Counsel is the basic

necessity for the citizen to cope with the system.

Post conviction remedies are inadequate without the diligence of the court. The conduct of a defense can be colorably effective to a layman yet entirely lack reasonable competence in adequately protecting the citizen's rights. Neither the bar nor the court have any guide lines for selection of criminal defense counsel which is rapidly approaching a specialty. Change of counsel is often fortuitous and without it shabby representation would never be brought to light except if the court recognizes it and acts. Except for a change of counsel in this case, the issue would never have been brought to the Supreme Court to ask that such diligence be exercised. To ignore the obvious and let litigants depend on post conviction remedies is not enough.

Post conviction remedies are further inadequate when the matter is plain on the face of the record, because rather than a simple decision on the obvious it involves a return to the exhaustion and great expense of litigation with the good possibility of again going through the appellate procedure with the concomitant waste of court resources. Further, the Petitioner may have to spend all or part of this time serving an illegal and unjust sentence. Here the Court of Appeals gave Petitioner a stay to petition the Supreme Court, not a remand to the District Court as requested by counsel in the petition for rehearing.

It should be recognized that present counsel entered the scene near curtain

time for this drama armed with but ten days to file a petition for rehearing. He did the only thing available, point out the state of this record.

2. A BARE READING OF THE RECORD SHOWS THAT PETITIONER LACKED EFFECTIVE COUNSEL.

As shown in the statement of facts, the record here bears out our contention that Petitioner lacked effective counsel below. Beasley v. United States (6th Cir. 1974) 491 F2d 687, a well written opinion, contains a good discussion of the standard to be applied in defining "assistance of counsel" as appears in the Sixth Amendment.

Certainly, although the defense and appeal here may have involved colorable legal representation to a layman, to any discerning mind the deficiencies are patently obvious. Former counsel did not exhibit defense strategy and tactics which lawyers of ordinary training and skill would consider competent.

In addition to things not done at the trial level there was not one point preserved for appeal which even warranted an opinion. In order to save anything at all Petitioner, a layman, literally had to file his own notice of appeal to overcome his counsel's neglect.

If this case contains the standard of practice which would adequately waive Constitutional deprivations, then the Constitution clearly has no real protection for those whom, by our oath we are sworn to protect. A bare reading of the

record has to show that Petitioner's representation was so inadequate that the judgment must be summarily reversed and a new trial granted or, at the very least, a stay be extended for a reasonable time with leave to institute post conviction remedies. Petitioner submits such fundamental Constitutional rights properly fall under the "plain error rule", Federal Rules of Criminal Procedure, 52(b); Vachon v. State of New Hampshire, 414 U.S. 478; 38 L.Ed.2d. 666.

CONCLUSION

For these reasons a writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

KERMITT L. WATERS
PATRICK R. DOYLE, of Counsel
323 Las Vegas Blvd. S.
Las Vegas, Nevada 89101

Counsel for Petitioner

October 7th, 1975.

A P P E N D I X

APPENDIX A-1

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEVADA

Filed June 17, 1974

Criminal LV 2767 RDF

UNITED STATES OF AMERICA,)
)
v.)
)
GEORGE V. H. KLEIFGEN,)
)

On this 14th day of June, 1974 came the attorney for the government and the defendant appeared in person and with counsel, Raymond E. Sutton.

It Is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of making false and fraudulent statements, in violation of Title 18, Section 1001 of the United States Code, as charged in counts 1 thru 9 of the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the

Attorney General or his authorized representative for imprisonment for a period of, AS TO COUNTS 1 THROUGH 9, INCLUSIVE, THREE (3) YEARS; and that the defendant shall become eligible for parole pursuant to Title 18, Section 4208(a)(2), United States Code, at such time as the Board of Parole may determine.

It Is Adjudged that the sentences imposed as to counts 2 through 9, inclusive, are to run concurrently with each other and concurrently with the sentence imposed as to count 1.

It Is Ordered that the execution of the sentence imposed is hereby stayed pending the decision of the Ninth Circuit Court of Appeals of its review of the district court decision.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Roger D. Foley
United States District Judge

JOHN A. PORTER, CLERK

By: /s/ P. Bluiett,Jr.
Deputy Clerk

APPENDIX A-2

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
U.S. Court of Appeals
and Post Office Building
7th & Mission Streets
P. O. Box 547
San Francisco, California 94101

Filed July 21, 1975

July 17, 1975

Re: No. 74-3179 United States of America v. George V. H. Kleifgen

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered affirming the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,
EMIL E. MELFI, JR.
Clerk
U.S. Court of Appeals

APPENDIX A-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

September 5, 1975

UNITED STATES OF AMERICA,	)	
	)	No. 74-3179
Appellee,	)	
	)	
v.	)	O R D E R
	)	
GEORGE V. H. KLEIFGEN,	)	
	)	
Appellant.	)	
	)	

Before: BARNES, Circuit Judge.

Defendant-appellant has moved this Court for an order recalling or vacating the mandate entered herein, pending final determination of this case.

Appellant has also filed a motion with this Court for an extension of time to file what has been described as a late or untimely motion for rehearing.

THEREFORE, IT IS HEREBY ORDERED:

(1) That the mandate entered in this proceeding be forthwith recalled by the Clark of this Court;

(2) That said mandate be stayed until further order of this Court;

(3) That appellant serve and file his

petition for rehearing on or before September 19, 1975;

(4) That the government may, but need not, file a response to said petition on or before September 24, 1975;

(5) That the petition for rehearing will stand submitted on September 30, 1975;

(6) That no motions or petitions other than the petition for rehearing (herein erroneously described as a motion for rehearing) are to be received or filed by the Clark of this Court without previous authority granted by this Court; and

(7) That this Court suggests to the District Court of the District of Nevada that it grant sua sponte additional time within which appellant must surrender to the United States Marshal to and including October 10, 1975, at 10:00 a.m.

/s/ Stanley N. Barnes
STANLEY N. BARNES
United States Circuit Judge

APPENDIX A-4

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Appellee,	)	No. 74-3179
	)	
v.	)	
	)	
GEORGE V. H. KLEIFGEN,	)	O R D E R
	)	
Appellant.	)	
	)	

Before: BARNES, TRASK, and SNEED, Circuit Judges

The Clerk of this Court has received from defendant's counsel two documents:

1. Motion for leave to file "oversized petition for rehearing, with suggestion for rehearing en banc."

2. The proposed oversized petition for rehearing, with suggestion for rehearing en banc.

The first document was filed on September 19, 1975; the second document was marked received by the Clerk, and not filed.

Thus, the only pending matter in this case is the above described motion.

The motion will be denied upon several grounds:

First: The proposed oversized petition

does not conform to or comply with Rules 40(a) and 40(b); Fed. R. App. P., or either of them;

Second: The motion does not conform to Rule 6(d) (through 6(a)) of the supplementary rules of this Court;

Third: The proposed oversized petition contains 49 pages of argument, relating to five asserted errors, four of which were never raised in the trial court or on appeal; and one of which (the 48(b) Rule) was raised on appeal and decided adversely to appellant, after the same alleged error was found to be without merit by the trial judges, both during the trials and repetitive motions for a new trial and for a judgment of acquittal.

Fourth: In addition to the argument on the issues mentioned above, appellant attaches 49 additional pages, divided between 12 Exhibits. Of these, Exhibits 1 and 2 are not in the record, and were prepared after the sentencing of defendant. Exhibits 3 to 6 are not in the record of this case, and are affidavits of jurors prepared after trial containing statements that at times approach the frivolous if not the ridiculous. 1/ Exhibit P.7 is an affidavit of an investigator prepared after trial, which relates a conversation with the juror who gave her

1/ "In my judgment Dr. Kleifgen's attorney did not present a very good defense and did not present a good image in his behalf at trial." (Ex. P. 3) "Several of my close friends in Las Vegas are attorneys . . . . that a woman on the jury next to me stated that her son would be angry with her for the way she voted." (Ex. P. 4) "That I served on one previous Federal Criminal jury trial previous to Dr. Kleifgen's trial." (Ex. P. 5) "That I previously sat on a Federal Criminal jury trial with the same jurors (name) and (name) prior to the trial of Dr. Kleifgen, involving fraud for which we found the defendant guilty." (Ex. P. 6)

own affidavit as Exhibit P.4, but who explained to the investigator the original vote of the jury was 11 to 1 for conviction; she being the "one" vote. Exhibits P.8 and P.9 are already part of the record before the court on appeal. Exhibit P.10 is a list of objections which defendant's present counsel assert defendant's former counsel should have made at the trial. Exhibit P.11 is apparently already in the record as Exhibit No. 26. Exhibit P.12 is an affidavit signed by Government Agent Clark apparently relating to the obtaining of a search warrant in another case; and apparently no part of the record in this case.

Fifth: There is no way that a majority of the documents or the pages contained in the 98-page "oversized petition for rehearing" can or could be considered by this Court on a rehearing of any kind. 2/ Appellant may have other relief, but the relief he seeks here is not available to him at this time

NOW THEREFORE, GOOD CAUSE APPEARING, it is the unanimous order of the panel hearing this case:

(1) that the motion to file "oversized petition for rehearing" is denied; and

(2) that the portion of the order filed by this Court on September 5, 1975 (appearing as Paragraph (5) thereof), is hereby revoked; and

2/ In *Duran v. United States*, 413 F.2d 596, 605 (9th Cir. 1969), *cert. denied*, 396 U.S. 917 (1969), this Court held: "It is Hornbook law that neither party can rely on evidence outside the record of the case on appeal . . . . We are limited on this appeal to the record made in the court below." 413 F.2d at 605. *In accord:*
United States v. Addonizio, 449 F.2d 100, 103 (3rd Cir. 1971);
United States v. Hedberg, 411 F.2d 607 (9th Cir. 1969);
Morgan v. United States, 380 F.2d 686, 700 (9th Cir. 1967), *cert. denied*, 390 U.S. 962, *rehearing denied*, 390 U.S. 1008 (1968).

(3) that no further motions by appellant are to be received or filed by the Clerk of this Court without order of the Court; and

(4) that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed until October 10, 1975, pending the filing, consideration, and disposition by the Supreme Court of the United States of a petition for Writ of Certiorari to be made by appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before October 9, 1975.

In the event the petition for Writ of Certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ BARNES

/s/ TRASK

/s/ SNEED

United States Circuit Judges

Dated: San Francisco, CA 9/30/75

APPENDIX B

PORTIONS OF RECORD SHOWING NEWSPAPER SEARCH AND SEIZURE

PROPOSED MOTION FOR REHEARING IN THE CIRSUIT COURT

..A brief summary of the pertinent facts..

Aetna Life and Casualty Company had a contract with the United States to administer the Medicare Program in various parts of the country invluding Nevada. (Tr. pg. 74-78)

The Reno Medicare Office initially corresponded with the Appellant on June 26, 1970, for the purpose of requesting substantiation for treatments rendered to one Mae Goodrum (Tr. pg. 78), and resulting excessive billings. Thereafter, the Reno field office and the Appellant corresponded with each other relative to other Medicare claims for substantiation of treatments and excessive billings originating from Appellant's office. Finally, on February 9, 1971, a Reno representative named William Eastwood visited Appellant's office to discuss the discrepencies in billings. It was at this time the Appellant informed Mr. Eastwood of the suspected misconduct of one Phyllis Horton McKenna, a former employee, regarding the excessive billings (Tr. pg. 77-79).

At sometime after February 9, 1971, but prior to May 3, 1971, as per their "intermediary manual," Mr. Eastwood turned the matter over to his superiors who in turn, turned it over to the Bureau of Health Insurance, an arm of the Social Security

Administration, for further investigation (Tr. pg. 97-98). Furthermore, upon submission of the matter to the Social Security Administration, the matter was also turned over to the Secret Service again as per the "intermediary manual" to which Aetna must adhere, (Tr. pg. 87).

Subsequently, on or about May 3, 1971, Mr. Eastwood was instructed by the United States Bureau of Health Insurance, through his superiors, to investigate further claims of eight separate beneficiaries of Dr. Kleifgen which showed patterns of over utilization of services rendered, (Tr. pg. 99).

As a result, on May 11, 1974, Mr. Eastwood again visited Appellant, Dr. Kleifgen's office. Dr. Kleifgen and his wife were extremely cooperative. It was at this time that many business records were examined, many documents acquired, and statements taken, all of which were self-incriminating. (See William Eastwood's report, a copy of which is attached hereto and made a part hereof and marked Exhibit P-11. (Trial Exhibit 26). On or about May 26, 27, or 28, 1971, a program integrity specialist (fraud investigator, Tr. p. 124, line 25) from the United States Bureau of Health Insurance then entered the picture. Mrs. Elizabeth Foley*, with Mr. Eastwood, again visited the office of Appellant, Dr. Kleifgen (Tr. p. 98). At their first meeting Mrs. Foley informed Dr. Kleifgen that she worked for the Federal Government for the Medicare Program and that she had received a complaint from the Appellant's office regarding the alleged misconduct of one Phyllis Horton. She further stated that it was her job to investigate frauds and

that since he was an informant, she was going to interview him to try and find out the facts of the case....During her visit, through the extreme cooperation of Appellant, Dr. Kleifgen and his wife, Mrs. Foley observed and acquired more incriminating statements and documentation subsequently utilized by the Government to convict Appellant, Dr. Kleifgen. After this visit, neither the Appellant nor his wife received any further notification from the Government regarding the progress of the "so-called" investigation. Not until the indictment came down in August, 1973, did the Appellant receive the end result.

APPENDIX C

PORTIONS OF RECORD SHOWING JURY BIAS AND PREJUDICE AGAINST PETITIONER

.... A brief summary of the pertinent facts ....

A.

Juror Dorothy Baxter concealed from Appellant and from the Court that she was a former patient of Appellant (compare Affidavid of Dorothy Baxter, Appendix D, with Tr. pg. 3, line 7; p. 4, line 2).

Dorothy Baxter had a daughter that was and is a secretary of the Attorney General of Nevada, Robert List, and another daughter who is married to a policeman, Appendix D. Juror Dorothy Baxter had also read in newspaper stories about Appellant's prior criminal abortion charges and did not disclose to the Court.

B.

Juror, Fred Kennedy, in his affidavit, Appendix D, said other jurors discussed Appellant' case prior to submission. That he had sat on several previous Federal criminal cases and that he and two other jurors sat together in a previous Federal criminal fraud case before being selected to sit on Appellant's case. That he had read newspaper accounts about Appellant's prior criminal charges.

C.

Juror Helen Bradley, in her affidavit states that during the trial she recognized the prosecuting attorney and a government witness from previous Federal criminal trials on which she had recently been selected prior to Appellant's trial, and, Helen Bradley says it was common knowledge when she attended high school in Las Vegas, that Appellant gave young girls abortions and silicone shots for their breasts. See affidavit of Helen Bradley, Appendix D. Helen

Bradley further says that jurors discussed matters about Appellant that was not in evidence and that she sat on 26 separate jury trials in Federal criminal trials in Las Vegas, 10 of which were held before she was selected to sit on Appellant's case.

D.

Juror, Johnston, was a former Special Court Martial Board Officer in the Navy, retired (Tr. p. 14, line 11) and that he had an entra judicial communication with a Government witness during the trial (R 28, R 29). Further Juror Johnston was employed by the United States of America at the Atomic Energy Commission (Tr. p. 34, line 22).

E.

Juror Litton had read about Appellant's former criminal charges (Tr. p. 1, line 19).

F.

So many of the jurors had read or heard on radio or television about Appellant's prior ccriminal charges that the trial judge adjourned into chambers to discuss the problems (Tr. p. 8 and 9, and Tr. p. 12, line 7).

The selected jury members had either read about Appellant's previous criminal charges, heard about Appellant's charges in Las Vegas or knew about Appellant's abortion and other charges from common knowledge in the community as follows:

Occupation	*Jurors*	*Newspaper Vior Dire*
Teacher	Sylvester - Tr. p. 4, p. 9, p. 10, p. 11	
Retired Navy-AEC	Johnston - Tr. p. 4, p. 5, p. 13, p. 29 p. 34	
Architect	Kennedy - Tr. p. 24, 25, 26	
Housewife	Baxter	
Housewife	Bradley	
	Finch	
Accountant	Horton	
Stock-broker	Gerage	
Wife works clerk for County Contractor Water District	Jim Hutchens	
Clerk	Skordoulis	
	Wilson	
Housewife	Loud - Tr. p. 7, p. 8, p. 20, p. 21	
Housewife	Litton - Tr. p. 7, p. 21, p. 22	
	Hutchins	

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE V. H. KLEIFGEN,	)	
	)	
Defendant-Appellant,	)	No. 74-3179
	)	
vs.	)	AFFIDAVIT OF
	)	
UNITED STATES OF AMERICA,	)	DOROTHY BAXTER
	)	
Plaintiff-Appellee.	)	
	)	

STATE OF NEVADA)
COUNTY OF CLARK) SS:

DOROTHY BAXTER, being first duly sworn upon her oath, deposes and says:

I am a housewife and I reside at 1720 E. Hassett, Las Vegas, Nevada.

That I was selected as a juror to sit on the criminal trial in March of 1974 involving Dr. Kleifgen in Las Vegas, Nevada, in the United States District Court.

That prior to the trial I had read about Dr. Kleifgen in the newspaper concerning accounts and charges against him involving abortion cases.

That I am a former patient, once on a diet plan, of Dr. Kleifgen, having been treated by him prior to the trial.

That I have a daughter who is married to a policeman in Anaheim, California, and I also have another daughter who is

secretary to present Nevada Attorney General, Robert List.

In my judgment Dr. Kleifgen's attorney did not present a very good defense and did not present a good image in his behalf at trial.

After the trial I was contacted by an FBI agent inquiring as to whether or not I had received any threats and I informed him that I had not.

/s/ Dorothy Baxter
DOROTHY BAXTER

Subscribed and sworn to before me
this 17th day of September, 1975.

/s/ Susan A. Ortiz
NOTARY PUBLIC

(Seal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE V. H. KLEIFGEN,	)	
	)	
Defendant-Appellant,	)	No. 74-3179
	)	
vs.	)	AFFIDAVIT OF
	)	
UNITED STATES OF AMERICA,	)	HELEN BRADLEY
	)	
Plaintiff-Appellee.	)	
	)	

STATE OF NEVADA)
COUNTY OF CLARK) SS:

HELEN BRADLEY, being first duly sworn upon her oath, deposes and says:

I am a housewife and I reside at 5232 Mountain View Drive, Las Vegas, Nevada.

I was selected as a juror to sit in a criminal case involving Dr. George V. H. Kleifgen in the United States District Court in Las Vegas, Nevada, in March of 1974.

That as a member of that jury I recall certain events as set forth below:

1. That during the course of the trial I possibly recognized one Government witness from a previous criminal trial on which I had been selected to also sit as a juror.

2. Also, I would like to state that while attending Las Vegas High School in the late 1950's it was common knowledge

at school that Dr. Kleifgen performed abortions for yound girls and women in Las Vegas and regularly performed silicone injections into women for cosmetic purposes. This was common knowledge within the area.

3. That during the trial I recall other members of the jury discussing facts about Dr. Kleifgen that was not part of the evidence during the trial.

4. That the juror to my immediate left, whose name I do not recall, was a woman who stated that her son would be angry with her for the way she voted.

5. That I have sat on 26 separate trials in the Federal Court in Las Vegas, approximately 10 of which were held prior to Dr. Kleifgen's trial, in which all but one of the ten were found to be guilty.

6. Several of my close friends in Las Vegas are attorneys.

7. I was contacted after the trial by an FBI agent inquiring as to whether I had received any threats.

/s/ Helen Bradley
HELEN BRADLEY

Subscribed and sworn to before me
this 17th day of September, 1975.

/s/ Susan A. Ortiz
NOTARY PUBLIC

(Seal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE V. H. KLEIFGEN,	
Defendant-Appellant,	No. 74-3179
vs.	AFFIDAVIT OF
UNITED STATES OF AMERICA,	HAROLD C. FINCH
Plaintiff-Appellee.	

STATE OF NEVADA)
COUNTY OF CLARK) SS:

HAROLD C. FINCH, being first duly sworn upon his oath, deposes and says:

I am a retired restaurant owner and reside at 1426 Boulder Beach, Boulder City, Nevada.

That in March, 1974, I was selected to serve on the Federal jury trial in Las Vegas, Nevada, in which Dr. Kleifgen was charged with defrauding medicare.

That I recall from memory a Federal agent called me after the trial to inquire whether or not I had been threatened as a juror.

That I served on one previous Federal Criminal jury trial previous to Dr. Kleifgen's trial.

My wife was previously employed with a doctor in Glendale, California.

/s/ Harold C. Finch
HAROLD C. FINCH

Subscribed and sworn to before me
this 17th day of September, 1975.

/s/ Susan A. Ortiz
NOTARY PUBLIC

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE V. H. KLEIFGEN,	)	
	)	
Defendant-Appellant,	)	No. 74-3179
	)	
vs.	)	AFFIDAVIT OF
	)	FRED L. KENNEDY
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee.	)	
	)	

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

FRED L. KENNEDY, being duly sworn upon his oath, deposes and says:

I am a licensed architect in the State of Nevada and my office is located at 730 E. Sahara, Las Vegas, Nevada.

In March, 1974, I was selected as a juror to sit on a case in the United States District Court, Las Vegas, Nevada, involving Dr. George Kleifgen who was charged with defrauding medicare.

That concerning that trial I recall the following:

1. Prior to the trial I had read in the newspapers about criminal charges involving Dr. Kleifgen.

2. That I remember other jurors discussing this case prior to submission which was cut short.

3. I recall testimony during the trial about Dr. Kleifgen giving vasectomy operations to policemen and silicone injections to women.

4. That I previously sat on a Federal criminal jury trial with the same jurors, Beth Sylvester and James Garage prior to this trial of Dr. Kleifgen, involving fraud for which we also found the Defendant guilty.

/s/ FRED L. KENNEDY
FRED L. KENNEDY

Subscribed and sworn to
before me this 17th day
of September, 1975.

/s/ SUSAN A. ORTIZ
NOTARY PUBLIC

(SEAL)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE V. H. KLEIFGEN,
Defendant-Appellant, No. 74-3179
vs. AFFIDAVIT OF H. LEE BARNS
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

STATE OF NEVADA)
) SS
COUNTY OF CLARK)

On September 16, 1975, at approximately 3:30 a.m., I contacted a Mrs. Dorothy Baxter at 1720 East Hassett, Las Vegas, Nevada; she was seated juror No. 4 in the Dr. Kleifgen trial.

In response to my questioning, Mrs. Baxter gave the following answers:

When asked about any prior contact or prior knowledge of Dr. Kleifgen, Mrs. Baxter stated that she had gone to Dr. Kleifgen as a patient and had received a prescription for diet pills because she had a weight problem. She also mentioned that Dr. Kleifgen had made some derogatory statement regarding her age indicating she might have been too old.

In response to questions involving the vote at the trial, Mrs. Baxter indicated in her answer that she had not voted the

guilty verdict originally and that the vote was 11 to 1 for guilty. She stated she held out and there was considerable debate and she received some pressure from other jurors, one of them (who is not identified) making a comment she wanted to be out of the deliberation by 5:00 because her son was expecting her.

When asked about any prior knowledge of Dr. Kleifgen in the newspapers or in publicity from the newspapers, Mrs. Baxter stated that she had read in the newspaper about Dr. Kleifgen being involved in a prior abortion case; she could not recall details. In response to questions about testimony, Mrs. Baxter stated that she did recall the testimony involving Dr. Kleifgen giving silicone shots, but did not recall the testimony about the vasectomies. However, she insisted that it did not influence her decision.

When asked what she based her decision on, she stated that at first she felt that the doctor perhaps might have signed the documents in question at the trial because they were set down in front of him for signature and as a matter of business was used to signing without reading and she could understand that. But, after re-examining the evidence, along with other jurors, came to the conclusion that the signatures, being so numerous, could not have been a matter of absent-minded signing.

In asking Mrs. Baxter if she had any relatives either in law enforcement or in the legal profession, she stated she had a son-in-law in Anaheim, California,

who is a police officer and that her other daughter is a secretary for Robert List, Attorney General for the State of Nevada.

When asked if Mrs. Baxter had served on a prior criminal jury, she said yes, she had. She stated that in the prior trial, involving a narcotic charge of "hash", she had voted guilty on the trial and then it ended in a hung jury. She also stated that she had been castigated by her son for voting guilty in that case.

In response to the question involving the presentation of the defense case, Mrs. Baxt stated that she did not feel that Dr. Kleifgen got a proper defense from his trial attorney because the attorney did not present a good image to the jury or give a proper defense.

Further, I interviewed Juror Richard Johnston and he informed me he had sat on 30 separate court martials while in the Navy between 1945 and 1955 and that his secretary was a former patient of Dr. Kleifgen.

I interviewed a total of seven jurors, to-wit: Johnston, Baxter, Bradley, Finch, Horton, Kennedy and Loud. Of the seven all but Johnston and Loud had sat on previous Federal criminal juries in Las Vegas immediately prior to being selected for Appellant's trial.

Dated: September 18th, 1975.

/s/ H. LEE BARNS
H. LEE BARNS

Subscribed and sworn to
before me this 18 day of
September, 1975.

/s/ JANET CHIEKO KASE
NOTARY PUBLIC

(SEAL)

APPENDIX E

FAILURE OF APPELLANT'S RETAINED COUNSEL TO OBJECT TO THE ADMISSION OF 41 GOVERNMENT EXHIBITS

Government Exhibit No.	*Description*	*Def's Atty Objected*	*Reason Objection Should Have Been Made*
1	Copy of letter to G.V.H. Kleifgen from W. Eastwood, dated June 26, 1970, re Mae Goodrum with attachments. Copy of letter.	No TR. p. 64	Best evidence, not signed, no foundation, *State v. Hawkins*, 294 A2d 584
2	Copy of letter to G.V.H. Kleifgen from W. Eastwood, dated September 29, 1970, re Estelle Shorr, et al. Copy of letter.	No TR. p. 64	Best evidence, no foundation, copy of a copy, irrevelant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
3	Letter to Aetna Life & Casualty from G.V.H. Kleifgen, dated 9/29/70 re Mae Goodrum	No TR. p. 64	No foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
4	Letter to Aetna Life & Casualty from G.V.H. Kleifgen, dated 11/23/70 re Tillie Dvorak	No TR. p. 64	No foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
5	Letter to Aetna Life & Casualty from G.V.H. Kleifgen, dated 11/23/70 re Golda Griffin	No TR. p. 64	No foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6

6	Letter to Aetna Life & Casualty from G.V.H. Kleifgen, dated 12/18/70 re Phyllis Horton	No TR. p. 64	No foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
7	Copy of letter to G.V.H. Kleifgen from W. Eastwood dated 1/8/71	No TR. p. 64	Best evidence, no foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
8	Letter to W. Eastwood from G.V.H. Kleifgen, dated 1/11/71	No TR. p. 64	No foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
9	Copy of letter to George V.H. Kleifgen from W. Eastwood, dated 3/25/71	No TR. p. 64	Best evidence, no foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
10	Letter to W. Eastwood from G.V.H. Kleifgen, dated 3/27/71	No TR. p. 64	No foundation, irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6
11	Medicare payment records dated Jan. 22, 1971 and July 27, 1970, re Golda P. Griffin (5 documents)	No TR. p. 64	No foundation, the witness on the stand was not the custodian of the records for Aetna or U.S.A. and therefore could not prove up proper foundation or authenticity, etc. *State v. Hawkins*, 294 A2d 584

12	Medicare payment records dated Jan. 22, 1971 and 8/19/70 re Tillie Dvorak (5 documents)	No TR. p. 64	Same as for above exhibit 11
13	Medicare payment records dated Feb. 1, 1971 and 9/21/70 re Clarence J. Buckey (5 documents)	No TR. p. 64	Same as for above exhibit 11
14	Medicare payment records dated Feb. 12, 1971 and 9/1/70 re Samuel L. Kapovich	No TR. p. 64	Same as for above exhibit 11
15	Medicare payment records dated Oct. 15, 1969 and Sept. 23, 1969, re Mae Goodrum (4 documents)	No TR. p. 64	Same as for above exhibit 11
16	Medicare payment records dated Feb. 10, 1970, Jan. 27 & 28, 1970, re Mae Goodrum (5 documents)	No TR. p. 64	Same as for above exhibit 11
17	Medicare payment records dated Nov. 5, 1970 and 5/29/70 re Mae Goodrum (5 documents)	No TR. p. 64	Same as for above exhibit 11
18	Medicare payment records dated Oct. 22, 1969 and 9/21/69 re Walter Goodrum (4 documents)	No TR. p. 64	Same as for above exhibit 11
19	Medicare payment records dated Jan. 15, 1970 and 12/29/69 re Walter Goodrum (5 documents)	No TR. p. 64	Same as for above exhibit 11
20	Medicare payment records dated May 25, 1970 and 4/27/70 re Walter Goodrum (4 documents)	No TR. p. 64	Same as for above exhibit 11

21	Statement and confession by Phyllis Horton dated May 9, 1971	No TR. p.301 & 485	Irrelevant and immaterial to dates and events in indictment (9/21/69 thru 8/19/70) R 1-6, also improper as proper rebuttal, best evidence not in Plaintiff's case in chief, irrelevant and immaterial on case in chief.
22	Statement of claimant or other person dated 5/27/71 containing handwriting exemplars of G.V.H. Kleifgen	No TR. p. 135	No Miranda Rights, no foundation, illegally obtained evidence.
23	Copies of records from Dr. Kleifgen's file re patients (20 pages)	No TR. p. 136	Unreasonable search and seizure, no Miranda, no foundation, illegally obtained.
24	Report of contract dated 5/28/71 43 Phyllis Horton by Elizabeth Foley	Not Offered	Not offered.
25	Memorandum from W. Eastwood dated 2/9/71 re Phyllis Horton and Samuel Kapovich	No TR. p. 92	No foundation, self serving. Cumulative since Eastwood was on the witness stand.
26	Memorandum from W. Eastwood to D.D. McDonald dated 5/12/71 re audit of Kleifgen's records	No TR. p. 100	No foundation, self serving. Cumulative since Eastwood & D.D. McDonald were witnesses for Plaintiff.
27	Statement of confession by Phyllis Horton, dated May 14, 1971 (3 pages)	No TR. p. 301 & 485	Xerox copy, best evidence, no foundation, improper, belongs in Plaintiff's rebuttal, irrelevant and immaterial on case in chief, cumulative.

28	Enlarged comparison chart of questioned and known handwriting of George V.H. Kleifgen. Relates to Exhibits 11, 20, 16 & 22	No TR. p. 485	No chain connection custody, no foundation, no authenticity established, *United States v. Wagner*, 474 F2d 121
29	Handwritten note delivered to Patsy Gillett by Jan Hamer	Not Offered	Not Offered.
30	Complaint, Summons, Praecipe for Default, George V.H. Kleifgen, M.D. v. Tally Gordon and Phyllis Horton, 10 pages in all (photocopy)	No TR. p. 680	Copy not certified, best evidence, irrelevant.
31	Certified copy of agreement between Aetna Life Insurance Company and Health, Education and Welfare, for period of 7/1/70 - 6/30/71	No TR. p. 46	Irrelevant to times and dates of offense charged in indictment (9/21/69 thru 8/19/70)
32	Statement of claimant or other person made by G.V.H. Kleifgen, M.D. re Sam Kapavich, dated 5/27/71	No TR. p. 135	Miranda objection
33	Statement regarding Tally Gordon by Patsy Lou Gillett (photocopy - 2 pages)	No TR. p. 463	Xerox copy, best evidence, no foundation, irrelevant on Plaintiff's case in chief.
34	Statement re Tally Gordon signed by Phyllis Ann Horton (Photocopy)	No TR. p. 290	Xerox copy, best evidence, no foundation, irrelevant on Plaintiff's case in chief, cumulative.

35	Statement regarding Tally Gordon by G.V.H. Kleifgen M.D., Phyllis Horton, LPN, and Jan Hall (Photocopy)	No TR. p. 290	Xerox copy, best evidence, no foundation, Miranda objection.
36	Photocopy of Affidavit for Search Warrant re: Phyllis Horton, 10/10/70 and Search Warrant dated 10/24/70 (4 pages in all)	No TR. p. 509	Xerox copy, best evidence, no foundation, irrelevant and immaterial.
37	Photocopy of letter to Clark County Sheriff's Office from Geneva Moore dated 5/6/71	Not Offered	Not offered.
38	Original letter dated 6/22/62 to Reed Whipple, First National Bank, Las Vegas, signed by G.V.H. Kleifgen, M.D.	No TR. p. 644	No foundation, irrelevant and immaterial, no possible connection.
39	11 checks payable to V.H. Kleifgen, M.D., or G.V.H. Kleifgen, dated 12/5/69 thru 6/18/70 for amounts ranging from $75.00 to $125.00 all from Hanover Life	Yes TR. p. 786	No foundation, irrelevant and immaterial, no possible connection.
40	6 checks payable to G.V.H. Kleifgen, M.D. or George V.H. Kleifgen, M.D. each in the amount of $125.00 dated 5/13/69 through 7/17/69. All from Hanover Life	No TR. p. 662	No foundation, irrelevant and immaterial, no possible connection.
41	Hanover Life Claims with copies of vouchers. 17 in all	Yes TR. p. 801	Not signed, no foundation, copies, best evidence, irrelevant and immaterial, no possible connection.

42	Handwriting exemplar of M. Kleifgen	No TR. p. 780	Miranda objection, self incriminating, objection 5th amendment.
43	Sheet showing examples of handwriting analysis	Rejected	No chain of custody, no foundation.
44	Photocopies (30 sheets) of checks (front and reverse sides)	Yes TR. p. 791	Best evidence, no foundation, irrelevant.
45	Photocopies (40 sheets) of checks (front and reverse sides)	Yes TR. p. 791	Best evidence, no foundation, irrelevant.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE V. H. KLEIFGEN,
Defendant-Appellant,
vs.) No. 74-3179
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

AFFIDAVIT OF DR. EDGAR BUTLER

EDGAR W. BUTLER CERTIFIES AS FOLLOWS:

That I am Professor of Sociology, Department of Sociology, University of California, Riverside, California, and Professor of Sociology, Department of Psychiatry, University of California, Los Angeles, California. My research specialities are urban ecology and sociology, epidemiology, research methods, and family. My full professional qualifications are shown in Attachment A.

That I am familiar with urban research methods, statistics, and sampling areas, and other geographic divisions, and sampling and statistics as they are related to developing random populations. These areas of expertise specifically apply to representative selection of jury panels and randomness of selection within jury panels.

That this Certificate is made and

provided at the request of Kermit L. Waters, attorney for defendant.

STATEMENT:

In determining the adequateness of jury panels, there are two paramount concerns. First, the question arises as to whether or not the jury panel is representative of the community it purports to represent. Second, is whether or not persons selected from the jury panel for actual jury duty are representative of the jury panel and/or the community. These two issues need to be separated since it is possible to have representation and randomness at one level without representation and randomness at the other. Several definitions of terms are absolutely necessary in this statement since they become vital to further discussion. One primary concept that needs to be defined is randomness. Randomness is especially significant since it has a rather specific, statistical and scientific meaning which ordinarily is violated by the general public. Random selection means specifically that each unit in a population, e.g., individuals living in a city or county, have an equal probability or chance of being selected. Random selection in this strict definition also means that individuals on any given list, e.g., a jury panel list, would have an equal probability or chance of being selected for a specific jury. Random selection does not mean haphazard selection, application of weights, or any other manner of selecting units (individuals or whatever). For emphasis, random selection

only applies when each unit has an equal probability or chance of being selected; any other use of this term is incorrect. Representativeness means that whatever sample is selected, it is much like that of the population from which it was selected. The best way in which to insure representativeness is to randomly select units from a population. When a sample is not representative, it is considered to be biased.

Using these definitions of concepts which are derived from statistical and research methodology literature and are generally accepted by scientists of all persuasions, it becomes readily apparent that both of them apply to the selection of jury panels and individual jurors from jury panel lists. Again, there are two paramount issues in evaluating jury panels and specific juries. First, was the original jury panel list derived in a random manner so that it is representative of the population? If it was not, the jury panel will be biased in certain ways. Two examples: (1) If jury panel members were selected only from social welfare or public stamp rolls, the list would be biased (obviously) toward people with low income, lower educational levels, more likely to rent than own their dwelling unit, to be transient, to be a minority (black or chicano), and likely not to be included on voter registration lists. Thus, this list is biased toward certain segments of the population and any jury panels selected from this list could not possible be representative of the general population of a city, county, etc. Such

jury panels can not possibly be representative since every person in the population does not appear on the list and no matter how the list is manipulated, it cannot produce a representative sample. Thus, even though a random sample (equal change of being selected) might be generated from the list for an individual jury, it cannot possibly be representative of the community at large because the original list was biased. Accordingly, such a jury panel list is not representative of the community even though the jury panel members were selected at random from the list. While perhaps this example is an easy one to accept, let us proceed to a second and basically the same kind of example. (2) Voter registration lists are almost the direct opposite of that described in the above example. Voter registration lists are biased in the direction of people with middle and upper incomes, higher educational levels, with people who are longer term residents and more likely to own than to rent their homes, more likely to live in single family housing units than apartments, and to be white (angelo). Thus, voter registration rolls also are not representative of the population that lives in any given community, city, metropolitan area, or county. Just as much as welfare rolls are biased in one direction, so are voter registration lists biased in another direction. In either example above, the utilization of these biased lists results in jury panels that cannot be and are not representative of the general population.

A second point alluded to above also

needs to be explored and it should be repeated that they are separate points. A representative or unrepresentative original list of jury panel members can be further biased by jury selection within given lists. For example, using either welfare rolls or voter registration lists as per above examples -- neither are representative of the community at large. Either one of these jury panel lists once compiled can be randomly sampled. Thus, it is possible to select a biased or nonrepresentative jury panel through the use of welfare rolls or voter registration lists and yet within each of these lists randomly select (each member on the list given equal probability or chance of being selected) individual jury members who would be representative of the list -- but not the community population. It also is possible to not randomly select among these lists and thus further bias an individual jury. For example, even if voter registration lists are utilized to compile original lists from which jury panels are selected, at least some minorities (blacks and chicanos) and lower income people will be available for jury duty. However, it would be possible to influence the actual jury selection process by systematically excluding such people in the actual selection process or by overselecting them in the jury selection process. This over or underselection process is called stratifying the sample. In both instances, it should be specifically noted that this stratifying process does not make the sample representative of the general population! What it does do is to spread out or contract the inclusion of certain

kinds of people on any given jury from the available lists.

An example of a representative and randomly selected jury panel and jury probably will help clarify questions in regard to the above. First, in the most ideal sense, if a jury panel is to be representative of the population, is has to be derived from a list of all members of that population in the community. For most communities in the United States such a list does not exist. Thus, many jurisdictions have utilized whatever already available lists exist, even though most of them are clearly biased or unrepresentative of the community. In Clark County, Nevada, several different lists are used, all of which are <u>biased toward</u> white, middle and upper income people, and biased against minorities and lower income people. Similarly, any other jurisdiction that uses voter registration lists, welfare rolls, etc., is biasing its jury panels in one direction or another. Since the ideal may not be attainable, it behooves any jurisdiction to approach the ideal the best it can. There are several manners in which the ideal can be approached. The major consideration is that whatever lists are used include as many people in the community as possible and that it not be biased against minorities and people with lower incomes. This last point is especially important since most lists do not include such people. Thus, voter registration lists, property owner lists, utility hookups, etc., all are biased against the poor and minorities. The most immediate mechanism to overcome

such deficiencies would be to utilize other lists such as welfare folls, unemployment compensation lists, etc., in combination with other lists. Another approach is to use less biased lists. For example, if the State of Nevada had a computerized list of persons with a driver's license, this would be more representative than these other lists, although even that list would have some bias against the poor and minorities since they are less likely to drive than middle and upper income people. Nevertheless, such a list would be more adequately representative of the community at large. Even with a complete enumeration of the population, it still remains a prerequisite that those persons on a representative jury panel be selected on a random basis if the panel and individual jury is to be adequately representative of the general population.

In summary of this statement thus far, it should be specifically noted that the terms representative and/or random cannot be used unless they clearly follow the definitions and procedures outlined above. If such definitions and procedures are not adhered to, the end result can only be biased jury panels and individual juries -- the direction of the bias dependent upon the compilation of the original list and how individual jurors were selected from that list. Given the manner in which Federal jurors are selected in the State of Nevada, as per certificate (No. 74-3179 -- re March, 1974) of John A. Porter, there is no question that the jury panel for Federal criminal jury trials in the <u>State of Nevada as of March, 1974, was</u>

highly biased. It was biased in the extent that it overrepresented middle and upper income individuals, those with higher than average educational levels, whites, persons with longer duration-of-residence in the community, home owners, single family dwellers, and above average age. On the other hand, it also was biased to the extent that it underrepresented lower income individuals, those with lower level educations, minorities, more recent inmovers and movers within the community, renters, and those who live in apartments and dwellings other than single family housing units, e.g., mobile homes, duplexes, etc. Accordingly, it is statistically impossible for such jury panels to be representative of Clark, Esmeralda, Lincoln, Nye, and White Pine counties of the State of Nevada, as of March, 1974.

This issue of random selection of individual jurors from the larger list generated from registered voters cannot be adequately evaluated from the information included in the certificate by John A. Porter. Again, I can only repeat that if specific procedures were not carefully adhered to which insured that each person on the list had an equal chance or opportunity to be selected, the term random selection process should not be used. It should be emphasized that even if at this stage random selection process procedures were adhered to, voter registration lists are biased lists to begin with and thus the jury panel could not be representative of the community at large -- in this case, the five indicated counties of the State of Nevada.

From my knowledge of the described procedures for selection of the jury in the case of George V. H. Kleifgen, the process could not possibly have resulted in a jury representative of the population of the five indicated counties of the State of Nevada.

Finally, it should be made explicit that the discussion in this statement assumes that the five county area in the State of Nevada is much like other cities and places that have been studied in the United States. That is, while approximately 60% of the eligible adult population is registered to vote, these registered voters are not representative of the general adult populations. It is possible, given a minimum amount of time, to demonstrate through actual information obtained from public records in these five counties and U.S. Census data to show that the professional opinions expressed in this statement apply to the State of Nevada and specifically to the five county area related to this case.

/s/ Dr. Edgar W. Butler

Dr. Edgar W. Butler
Professor of Sociology
University of California
Riverside and Los Angeles

STATE OF CALIFORNIA)
) ss:
COUNTY OF RIVERSIDE)

On the 18th day of September, 1975, before me, the undersigned, a Notary Public in and for said State, personally appeared DR. EDGAR W. BUTLER, Ph.D., known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

/s/ Louise Dodson
Notary Public in and for
said State and County.

(Seal)

SECTION II — PRIVILEGED COMMUNICATION

BIOGRAPHICAL SKETCH

(Give the following information for all professional personnel listed on Page 1, beginning with the Principal Investigator. Use continuous pages and follow the same general format for each person.)

NAME	TITLE	BIRTHDATE (Mo., Day, Yr.)
Edgar W. Butler, Ph.D.	Professor	November 4, 1929
PLACE OF BIRTH (City, State, County)	**PRESENT NATIONALITY** (If non-U.S. citizen, indicate kind of visa and expiration date)	**SEX**
Rapid City, S. D.	U.S.	(x) Male ( ) Female

EDUCATION *(Begin with baccalaureate training and include postdoctoral)*

INSTITUTION AND LOCATION	DEGREE	YEAR CONFERRED	SCIENTIFIC FIELD
California State University, Long Beach	B.A.	1958	Social Science
University of Southern California	M.A.	1962	Sociology
University of Southern California	Ph.D.	1965	Sociology

HONORS

(See Below)

MAJOR RESEARCH INTEREST	ROLE IN PROPOSED PROJECT
Urban Sociology/Ecology and Epidemology of Impaired Competence	Principal Investigator

RESEARCH SUPPORT *(See instructions)*

1. MH 08667, "A Longitudinal Epidemiology of Impaired Competence," $316,398, January 1, 1974 - December 31, 1976; current year, $121,879, 20% Academic year, 80% summer months, NIMH.
2. MOE-E-74-0095, "Longitudinal Study of School Labelled Handicapped and Normal Children," $160,402, June 1, 1974 - June 30, 1976; current year, 80% Academic year, 20% summer months, NIE.

Butler, Edgar W.
548-36-4964

RESEARCH AND/OR PROFESSIONAL EXPERIENCE *(Starting with present position, list training and experience relevant to area of project. List all or most representative publications. Do not exceed 3 pages for each individual.)*

Research and Administrative Experience:

July 1, 1974	Principal Investigator (NIE), $121,398
Jan. 1, 1974	Principal Investigator (NIMH), Pacific-Neuropsychiatric Institute, UCLA ($316,398)
Jan., 1972-Dec. 31, 1973	Principal Investigator (NIMH), Socio-Behavorial Laboratory, Pacific State Hospital, Pomona, California ($115,262.00)
July, 1971	Current Professor, University of California, Riverside
Jan., 1970-July, 1971	Chairman, Department of Sociology, University of California, Riverside
Aug., 1969	Research Specialist IV, Project Administrator, Socio-Behavorial Laboratory, Pacific State Hospital, Pomona, California
Feb., 1969-Feb., 1973	Co-Principal Investigator, Residential Movements and Housing and Neighborhood Quality: A Longitudinal National Study (National Science Foundation; $225,000)
June, 1968	Research Associate, Activity Styles in the Black Community: Washington, D. C. (Ford Foundation)
Sept., 1967-1969	Faculty Council, University of North Carolina (Elected Members)
June, 1966-July, 1969	Principal Investigator and Director, Winston-Salem Police Department. Evaluation of Community Services Unit, (North Carolina Fund; $75,000)

Butler, Edgar W.
548-36-4964

Feb., 1966-Feb., 1968	Co-Principal Investigator, Residential-Mobility and Locational Preferences: A National Study (National Academy of Sciences; ($100,000)
Sept., 1965-Sept., 1966	Co-Principal Investigator and Co-Project Director, Community Leadership and the Poverty Program (Office of Economic Opportunity; $25,000)
Sept., 1965-Sep., 1966	Member, Advisory Board, Population Studies Center, University of North Carolina
Oct., 1963-Sept., 1964	Co-Principal Investigator and Project Director, Institute of Mental Health Grant, Los Angeles, County Probation Department
June, 1962-Oct., 1963	Field Director, National Institute of Mental Health concerned with "Mental Retardation in a Community," Pacific State Hospital
Feb., 1961-June, 1962	Research Supervisor, Population Research Laboratory, Department of Sociology, University of Southern California
Feb., 1960-Feb., 1961	Research Assistant. Participated in social research activities, Population Research Laboratory, University of Southern California
Sept., 1967	*Social Science Quarterly*, Consulting editor
Sept., 1964-Aug., 1969	*Social Forces*, Associate editor
Sept., 1969	*Demography*, Consulting editor
July 1, 1972-	*American Journal of Mental Deficiency*, Consulting editor

Teaching Experience:

July, 1969	Professor of Sociology, University of California, Riverside, teaching Urban Sociology, Ecology, Research Methods, Social Stratification, Survey Methods, The Family
Sept., 1964	Instructor, Assistant Professor of Sociology, teaching Introduction to Sociology, Social Problems, The City, Research Methods, Research Methods Seminar, and Advanced Urban Seminar, University of North Carolina at Chapel Hill
Feb., 1961- Feb., 1963	Lecturer in Sociology, University of Southern California, Los Angeles, California. Held this position concurrently with those of Research Supervisor and Research Assistant in Population Research Laboratory

Consultant Experience:

Sept., 1967- Sept., 1969	Child Group Care Project—Southeastern United States, School of Social Work, University of North Carolina
July, 1966- Sept., 1969	Board of Christian Education, Presbyterian Church in the United States, Richmond, Virginia
March, 1966- Sept., 1969	North Carolina Fund, Durham, North Carolina
June, 1965	Urban and Regional Studies Center, University of North Carolina, Chapel Hill

June, 1962	Population Research Laboratory of the Department of Sociology, University of Southern California
Sept., 1964- Dec., 1965	Los Angeles County Probation Department's NIMH Project of which I was formerly Co-Principal Investigator and Project Director
Sept., 1963- Sept., 1964	California State Financed Study of Aging, Pasadena, California
Current	Intermittent Grant Proposal Evaluation: National Science Foundation; NIMH: Center for the Study of Metropolitan Problems
	Consultant: National Sciences Foundation—Social Systems and Human Resources

Books and Monographs:

Moving Behavior and Residential Choice: A National Survey, Washington, D.C.:
National Academy of Sciences (NCHRP Division), with F. Stuart Chapin, Jr., George C. Hemmens, Edward J. Kaiser, Michael A. Stegman, and Shirley F. Weiss, 1969.

Books and Monographs in Progress:

Urban Sociology and Ecology: A Selective Approach,
New York: Harper & Row.
The Urban Nomads, with Edward J. Kaiser and Ronald J. McAllister.
The Restless Metropolis, with Maurice D. Van Arsdol, Jr. and Georges Sabagh.
Impaired Competence In An Urban Community, with Tzuen-jen Lei and Wayne Usui.

Butler, Edgar W.
548-36-4964

Articles:

"Demographic and Social Psychological Factors in Residential Mobility," *Sociology and Social Research,* 48 (January, 1964), pp. 139-154, with Georges Sabagh and Maurice D. Van Arsdol, Jr.

"Social Development Performance and Mental Ability," *American Journal of Mental Deficiency,* 69 (September, 1964), pp. 195-205, with Jane R. Mercer and Harvey F. Dingman.

"Personality Dimensions of Delinquent Girls," *Criminologica,* 3 (May, 1965), pp. 7-10.

"Typologies of Delinquent Girls: Some Alternative Approaches," *Social Forces,* 44 (March, 1965), pp. 401-407, with Stuart N. Adams. (Also, in a slightly expanded version, this article is in *Interdisciplinary Problems in Criminology,* Columbus, Ohio: The Ohio State University, 1965, pp. 197-208; (and by permission this article has been reprinted and distributed by the Law-Medicine Institute, Boston University).

"Anomia and Eunomia: A Methodological Evaluation of Srole's Anomia Scale," *American Sociological Review,* 31 (June, 1966), pp. 400-406, with Curtis R. Miller.

"An Action and Research Program in a Delinquent Girls Residential Treatment Center," *Police,* 10 (July-August, 1966), pp. 74-81.

"Disengagement of the Aged Population and Response Differentials in a Survey Research," *Social Forces,* 64 (September, 1967), pp. 89-96, with Jane R. Mercer.

"A Longitudinal Examination of Two Models of Urban Spatial Differentiation: A Case-Study of Los Angeles," *Research Previews,* 14 (March, 1967), pp. 2-25, with William J. Barclay.

Butler, Edgar W.
548-36-4964

"Retrospective and Subsequent Metropolitan Residential Mobility," *Demography,* 5 (No. 1, 1968), pp. 249-266, with Maurice D. Van Arsdol, Jr. and Georges Sabagh.

"Community Power and Public Welfare," *American Journal of Economics* and *Sociology,* 28 (January, 1969), pp. 17-27, with Wayne Paulson and Hallowell Pope.

"The Determinants of Metropolitan Residential Mobility: Some Theoretical Considerations," *Social Forces,* (September, 1969), with Georges Sabagh and Maurice D. Van Arsdol, Jr.

"Prediction of Residential Movement and Spatial Allocation," *Urban Affairs Quarterly,* 6 (June, 1971), pp. 477-494, with Edward J. Kaiser.

"Urban Violence and Residential Mobility," *Journal of the American Institute of Planners,* 37 (September, 1971), pp. 319-325, with Ronald J. McAllister, Edward J. Kaiser and Theodore Droettboom, Jr.

"Residential Mobility Patterns of Blacks and Whites: A National Longitudinal Survey of Moving Behavior," *American Journal of Sociology,* 77 (November, 1971), pp. 445-456, with Ronald J. McAllister and Edward J. Kaiser.

Reprinted in *Housing: 1971-1972,* George Sternlieb (ed.), New York: AMS Press, 1974, pp. 329-338.

"Family Socio-Cultural Background and the Behavioral Retardation of Children," *Journal of Health and Social Behavior,* 13 (September, 1972), pp. 318-326, with Tzuen-jen Lei and Georges Sabagh.

"Migration, Participation, and Anomia," *Sociology and Social Research,* 56 (July, 1972), pp. 440-452, with Gerard J. Hunt.

"History and Suggested Protocol," in *Oxidant, Air Pollution Effects on a Western Coniferous Forest Eco-*

system, Riverside, California: Statewide Air Pollution Research Center, January, 1973, Section F.

"Patterns of Social Interaction Among Families of Behaviorally Retarded Children," (February, 1973): 93-100, *Journal of Marriage and The Family,* with Ronald J. McAllister and Tzuen-jen Lei (Reprinted in *Nursing Digest,* 1 (September, 1973): 86-91).

"Some Problems With Accessibility Standards: An Empirical Test," forthcoming, *Review of Regional Science,* III (Winter 1972-73): 111-123, with Edward J. Kaiser, Ronald J. McAllister and Russell W. Thibeault.

"Accessibility Satisfaction, Income and Residential Mobility, forthcoming, *Traffic Quarterly,* 27 (April, 1973): 289-305, with Russell W. Thibeault, Edward J. Kaiser, and Ronald J. McAllister.

"Involuntary and Voluntary Residential Mobility and Their Effects Upon Males and Females," (May, 1973): 219-227. *Journal of Marriage and The Family,* with Ronald J. McAllister and Edward J. Kaiser.

"The Adaptation of Women to Residential Mobility," *Journal of Marriage and The Family,* (May, 1973): 197-204, with Ronald J. McAllister and Edward J. Kaiser.

"Evolution of a Strategy for the Retrieval of Cases in Longitudinal Survey, Research," *Sociology and Social Research,* 58 (October, 1973): 37-47, with Steven J. Goe and Ronald J. McAllister.

"Preliminary Considerations In A Strategy For Tracking Respondents in Longitudinal Surveys," *Public Opinion Quarterly,* 37 (Fall, 1973): 413-416, with Ronald J. McAllister and Steven J. Goe.

"Mental Retardation in a School System Before and After Desegregation," *Social Problems,* 21 (June, 1974): 740-754, with Leonard Beeghley.

"Environmental Variation in Community Care Facilities for the Mentally Retarded," *American Journal of Mental Deficiency,* 78 (January, 1974): 429-439, with Arne Bjaanes.

"The Ecology of Retardation: Two Views," *Social Science and Medicine,* 8 (1974): 585-589, with Ronald J. McAllister and Tzuen-jen Lei.

"An Ecological Study of Agency Labelled Retardates In An Urban Community," with Tzuen-jen Lei, Louis Rowitz, and Ronald J. McAllister, forthcoming, *American Journal of Mental Deficiency,* 79 (July, 1974): 22-31.

"Policy Instrument Workshop III: Restrictions on Uses of Funds," Edgar W. Butler and Harvey Galper, *Proceedings of the Conference on Revenue Sharing Research,* Robert W. Rafuse, Jr. (ed.), Washington, D.C.: National Planning Association, 1974, pp. 26-30.

"Air Pollution and Metropolitan Population Redistribution," forthcoming, *Growth and Change,* with Ronald J. McAllister and Edward J. Kaiser.

"Theoretical and Empirical Issues and Sources of Response Error in Survey Interviewing," forthcoming, *Public Opinion Quarterly,* with John H. Freeman.

"Impaired Competence in An Urban Community: An Ecological Analysis," with Ronald J. McAllister and Tzuen-jen Lei, *Urban Affairs Quarterly,* forthcoming.

Miscellaneous Publications:

"Ethnic Groups in the Los Angeles Area," in Richard A. Gable, *Survey of Local Government Personnel Practices Related to Foreign Language Competence in the Los Angeles Metropolitan Area,* for the United States Office of Education, School of Public Administration, University of Southern California, February 27, 1961, pp. 18-46.

Household Survey Manual, Pomona, California: Pacific State Hospital, Summer 1963, with Jane R. Mercer, 112 pp. (Multilithed).

An Empirical Examination of the Relationship of Vertical Occupational Mobility and Horizontal Residential Mobility, Los Angeles: Population Research Laboratory, Department of Sociology, August, 1965.

"Evaluation of an Action Program in an Institution for Delinquent Girls," *Research Previews,* 13 (April, 1966), pp. 51-66.

"The Population Program at the University of North Carolina," *Research Previews,* 13 (April, 1966), pp. 33-36.

"North Carolina Birth Rates," *Research Previews,* 13 (November, 1966), pp. 11-21, with Jeanne C. Biggar.

Community Services Unit: First Report and Preliminary Evaluation, Winston-Salem: Winston-Salem Police Department, July, 1967, 98 pp. (Mimeographed)

"The Negro Population" in *Atlas of North Carolina.* Chapel Hill: The University of North Carolina Press, 1967.

"Data: Police, Citizens, and Rioters," *Research Previews,* 15 (November, 1968), pp. 7-12, with Carol Godley.

"Residential and Occupational Segregation of Negroes During Reconstruction: Savannah, Georgia." *Research Previews,* 16 (April, 1969), pp. 9-11, with Matilda Curtis.

Articles in Progress:

"Social Behavior Patterns and Alienation of Natives and Urban and Rural Migrants to a Metropolitan Area: with Gerard J. Hunt.

"Determinants of Public Expenditures: A Casual Analysis," paper to be submitted after revision to *American Journal of Economics and Sociology*, with Wayne C. Paulson.

"Ethnic and Social Status of School Neighborhoods and the Intellectual Impairment and Behavorial Retardation of Children," with Tzuen-jen Lei and Georges Sabagh, Pacific Sociological Association meetings, April, 1975.

"Parental Evaluations and Expectations of Impaired and Normal Children," with Wayne Usui and Ronald J. McAllister, Pacific Sociological Association meetings, April, 1975.

"Public Welfare and Mentally Retarded Persons," with John Kalin and Paul Wiley.

"Childhood Impairments and Subsequent Social Adjustment," American Association of Mental Deficiency, Toronto, Canada, June, 1974, with Tzuen-jen Lei and Ronald J. McAllister.

"Patterns of Social Participation of Rural and Urban Migrants to an Urban Area," Pacific Sociological Association, March, 1974, with Wayne Usui and Tzuen-jen Lei.

Papers Presented at Professional Meetings:

"Family Cohesion in a Metropolitan Area," paper presented at the Pacific Sociological Association, Sacramento, California, April 5, 1962, with Elizabeth Jones, Georges Sabagh, and Maurice D. Van Arsdol, Jr.

"Mental Retardation, Anomie, and Social Isolation," paper presented at the Pacific Sociological Association, Portland, Oregon, April 25, 1963, with Jane R. Mercer and Harvey F. Dingman.

"Distribution of the Aged and Area Differentiation," paper presented at the Pacific Sociological Association, San Diego, California, March, 1964, with Hooshang Poorkaj and James A. Peterson.

"Public Social Welfare and Bureauracy," presented to the Society for the Study of Social Problems, Chicago, August, 1965, with Hallowell Pope.

"Factors Related to Neglect of Client Needs in Public Welfare," paper presented at the Southern Sociological Association, New Orleans, Louisiana, April 9, 1966, with Hallowell Pope.

"Community Power Structures, Industrialization, and Public Welfare Programs: Paper presented at the American Sociological Association, Miami, Florida, August-September, 1966, with Hallowell Pope.

"The Abandoned Environment: Residential Mobility and Alternative Housing and Neighborhood Environments," presented at the Pacific Sociological Association, San Francisco, March, 1968, with Georges Sabagh and Maurice D. Van Arsdol, Jr.

"Urbanization, Industrialization, and Fertility in a Southern State," paper presented at the Population Association of America, Cincinnati, Ohio, April, 1967, with Jeanne C. Biggar.

"A Longitudinal Examination of Changing Spatial Differentiation in Four Southern Cities," paper presented at the American Sociological Association, San Francisco, California, September, 1967, with J. Richard Udry.

"Metropolitan Differentiation and Population Change," paper presented at the American Sociological Association, Boston, Mass., August, 1968.

"Spatial Mobility Differentials by Socioeconomic Status, Intergenerational and Career Social Mobility," paper presented at the American Sociological Association, Washington, D.C. August, 1970, with Maurice D. Van Arsdol, Jr. and Georges Sabagh.

"Propensity to Move, Geographic Mobility, and Community Change," paper presented at the Society for the Study of Social Problems, Denver, Colorado, August, 1971, with Ronald J. McAllister and Edward J. Kaiser.

"Changing Population Redistribution in Four Southern Cities," paper presented to the Southern Sociological Association, New Orleans, La., April, 1972, with Charles Chase and J. Richard Udry.

"Anticipated Migration, Migration and Social Integration," paper presented to the Southern Sociological Association, New Orleans, La., April, 1972, with Gerard J. Hunt and Ronald J. McAllister.

"Residential Mobility and Social Interaction Patterns of Black Urban Teenagers," paper presented to the Pacific Sociological Association, Portland, Oregon, April, 1972, with Marilyn Thinger.

APPENDIX G

RAYMOND E. SUTTON, ESQ.
Attorney at Law
325 South Third St., Suite 3
Las Vegas, Nevada 89101
Telephone : (702) 384-1935

Attorney for DEFENDANT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

* * * *

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CRIMINAL
GEORGE V. H. KLEIFGEN, Defendant.	)	LV-2767 RDF

AFFIDAVIT IN SUPPORT OF
MOTION FOR NEW TRIAL

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

NELMA LOCKHART aka JAN HALL aka JAN HAMMER, being first duly sworn, upon oath, deposes and states:

1. That my name is NELMA LOCKHART aka JAN HALL aka JAN HAMMER, and that I

presently reside at Village Green Estates, Las Vegas, Nevada.

2. That I began to work for Dr. George Kleifgen, as an extra office assistant in June, 1966. I was hired to replace a former office assistant named Patsy Gillette. At the time I went to work for Dr. Kleifgen, Tally Gordon was employed and was in complete charge of the office.

Tally Gordon instructed me in the office routines and informed me that she handled all banking, money, ledgers, and other business records. That she and her mother, Ann Beverly, were in charge of all business details.

3. That I worked for Dr. Kleifgen for a few months and then I left to enter show business. That during the first half of 1967 I returned to work for Dr. Kleifgen, at his request. I worked three-day intervals for approximately three weeks.

At this time I owed Dr. Kleifgen some money, and my work enabled me to liquidate my indebtedness.

4. That in addition to Tally Gordon and Pat Gillette, I also worked with Phyllis Horton and with Wanda Dingle.

Wanda Dingle worked for a short period of time, and I observed that she disliked correction, became irritated with patients, and would be rude with patients, even to the point of hanging the telephone up on the patient.

5. I was aware that Dr. Kleifgen fired Wanda for incompetency, and at that time noted her hostility toward Dr. Kleifgen.

6. That at one time I substituted for Tally Gordon, since she was ill in the early stages of pregnancy. The day I worked for Tally the Doctor arrived at 9:30, put patients in various rooms, and at that point Tally called. She told me to look in the money box where she had left a bundle of cash and checks on top. She asked that I seal them in an envelope, and she would take care of them when she came in the following Monday.

At the conclusion of the day's business, I added the cash and checks taken in for the day and the total was in perfect balance. When Phyllis and I returned to the office on the following Monday, Phyllis, in my presence, attempted to balance the money that Tally had taken in before I came to work on Friday. She found what she determined to be a $95.00 shortage, and two whole days of income not deposited. Tally was called and she claimed she had taken the money out to deposit in the doctor's account, but she hadn't done this.

7. Tally would also keep her own records for silicone patients which she took from the daily sheet and withheld for transcribing to her own silicone record.

8. In late July, 1969, Dr. Kleifgen's then accountant showed him a whole day's income missing and other indications of theft. Doctor arranged for me to stand behind a door while he directly accused

Tally of theft. Phyllis Horton was also present. When Tally was confronted, she stated that she may have been taking a few dollars, but nothing like the doctor was talking about in the terms of $5,000.00. Her comments were directed at Phyllis, and Phyllis retorted that Tally had suggested that they split $100.00 every day. Tally left that day and never came back, so far as I know.

9. During the time that I worked for Dr. Kleifgen's office, I was never aware that he had instructed any of the girls to pad billings. The other girls and I were very friendly, and if the doctor had wanted bills padded, I am sure that it would have been discussed. Dr. Kleifgen never came into the business office, since he was too busy treating patients.

10. When Patsy Gillette was working at the office I noted that she took many amphetamines. She admitted that she developed headaches from the medications that she took and that Dr. Kleifgen had prescribed demerol tablets for her headaches.

11. One day Dr. Kleifgen jokingly told Pat Gillette that Mrs. Kleifgen had suggested that she was stealing from the doctor, but that he didn't believe it.

12. I remember a medicare patient, Victoria Morris, who was very secretive with Phyllis. I also observed both Pat and Tally write and sign prescriptions for patients at the window who were in a hurry.

13. That I was visited by a Social Security Investigator, who was dark headed, short, very rotund and insolent. I related to him the matters contained in this Affidavit and told him I would be available to testify on Doctor Kleifgen's behalf. I inquired how he found my residence and he responded with great difficulty. I was contacted by this man approximately two weeks prior to Dr. Kleifgen's March 25, 1974 trial.

14. I left Las Vegas on March 28, 1974 and was absent from my residence for approximately two weeks. A male friend occupied my apartment during my absence, taking care of my dog and my garden. I was aware that a process server was at my residence and when I returned I was contacted by a girl friend who had been contacted by Dr. Kleifgen with reference to my whereabouts.

/s/ Nelma Lockhart

NELMA LOCKHART, aka JAN HALL aka JAN HAMMER

Subscribed and Sworn to before me this 8th day of May, 1974.

/s/ Delora Arant
Notary Public in and for said County and State

(Seal)

RECEIPT OF A COPY of the foregoing AFFIDAVIT is hereby acknowledged this 29th day of May, 1974.

V. DE VOE HEATON, United States Atty.

By /s/ V. De Voe Heaton
~~Assistant~~ United States Attorney
300 Las Vegas Blvd. South
Las Vegas, Nevada 89101

No. 75-546

In the Supreme Court of the United States

OCTOBER TERM, 1975

GEORGE V. H. KLEIFGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-546

GEORGE V. H. KLEIFGEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied the effective assistance of counsel both at trial and on appeal.

Following a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of nine counts of filing fraudulent claims for payment under the Medicare program, in violation of 18 U.S.C. 1001.[1] He was sentenced to three years' imprisonment on each count, the terms to run concurrently. The court of appeals affirmed without opinion. Petitioner's untimely petition for rehearing was denied (Pet. App. A).

Petitioner was a medical doctor, many of whose patients were eligible for coverage under the Medicare Act, 42 U.S.C. 1395, *et seq.* Alerted by what appeared to be

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[1]Petitioner's earlier trial on the same charges had ended in a mistrial when the jury were unable to reach a verdict.

excessive billings for services rendered to Medicare patients, an insurance claims representative requested that petitioner furnish additional documentation in order to substantiate his requests for payments (Tr. 78). Comparison of petitioner's patient records with his billings for Medicare compensation and interviews with his patients disclosed that many patients had not received the treatments specified on the request for payment forms and that petitioner had not treated these patients as frequently as his billings indicated (Tr. 128-133, 149, 165-166, 175, 182-183, 185, 202-204, 212-213). Furthermore, handwriting analysis showed that petitioner had signed the requests for payment and endorsed the Medicare compensation checks (Tr. 223-226, 235-237). Petitioner's complicity was substantiated by the testimony of four former employees, each of whom testified to an established practice of overbilling at petitioner's direction. Under this scheme, a diagnosis was listed that would support repeated office visits by the patient; subsquently, dates for the fictitious "treatments" were filled in at random, and corresponding request for payment forms were submitted (Tr. 263, 266-267, 276, 335-336; 339, 402-403, 441-442, 458).

Petitioner contends (Pet. 3-10) that he was denied the effective assistance of counsel both at trial and on appeal.[2] However, the record demonstrates that petitioner was represented by a conscientious, aggressive advocate and that his claim of ineffective assistance of counsel is groundless. Although the courts of appeals differ in the manner that they formulate the standard for ineffective assistance of counsel, compare *United States* v. *Robinson*, 502 F. 2d 894 (C.A. 7); *United States ex rel. Walker* v.

[2]Petitioner's contention that the assistance of counsel on appeal was inadequate is based primarily on the fact that the court of appeals affirmed his conviction without opinion (Pet. 14). But his attorney developed eleven separate issues in his brief on appeal. That the court of appeals chose to affirm petitioner's conviction summarily in no way reflects upon the adequacy of his attorney's representation.

Henderson, 492 F. 2d 1311 (C.A. 2), certiorari denied, 417 U.S. 972, with *Beasley* v. *United States*, 491 F. 2d 687 (C.A. 6); *United States* v. *DeCoster*, 487 F. 2d 1197 (C.A. D.C.), under any imaginable standard, petitioner received effective assistance. The record shows that counsel's performance was well within the range of competence demanded of attorneys in criminal cases, *McMann* v. *Richardson*, 397 U.S. 759, 771, and did not impair the essential integrity of these proceedings.

Petitioner cites (Pet. 7-10) several examples of counsel's allegedly inadequate performance. In particular, he emphasizes counsel's failure to object to the allegedly prejudicial composition of the jury, his failure to move to suppress certain evidence, his failure to object to the introduction of certain documentary evidence, and his failure to subpoena a potential defense witness to testify at trial.[3] These contentions, even if supported, would not establish a denial of petitioner's Sixth Amendment right to the effective assistance of counsel, for the tactical conduct or strategic miscalculations of counsel afford no constitutional grounds for relief. *McMann* v. *Richardson, supra; United States ex rel. Walker* v. *Henderson, supra.*

1. Petitioner's contention (Pet. 7) that counsel should have moved to suppress petitioner's office files is specious. These documents were not seized by federal authorities but rather were turned over to the insurance claims representative by petitioner in his attempt to prove that his former office assistant was responsible for the fraudulent excessive billings. Petitioner's statements to

[3]The same attorney had previously represented petitioner in his first trial, which resulted in a deadlocked jury. With the exception of Henry Gordon, an attorney, every defense witness who testified at petitioner's first trial also testified at his second trial.

the insurance representative that the endorsements on the checks were forged (Tr. 133-134) were not subject to suppression under *Miranda* v. *Arizona*, 384 U.S. 436, since that prophylactic rule applies only to custodial interrogations. These statements were given voluntarily at a time when petitioner was not in custody and when the investigation was focused exclusively on the office assistant.

2. Petitioner further contends (Pet. 8, 9) that trial counsel was remiss in not challenging the alleged "systematic exclusion" of minority groups from the jury panel. That panel, however, was drawn from voter registration lists, and such lists are the common and appropriate source from which jury panels are drawn. 28 U.S.C. 1861, *et seq.*; see, *e.g.*, *United States* v. *Ross*, 468 F. 2d 1213, 1216 (C.A. 9), certiorari denied, 410 U.S. 989. Whether a given jury panel is fairly representative of the community is a complex legal and factual question upon which experienced attorneys may differ. While it cannot be stated with absolute assurance that a challenge to the composition of this jury panel would not have resulted in the voter registration lists being supplemented from other sources, the absence of such an attack in no way indicates that petitioner was ineffectively represented by counsel below.

Futhermore, the record does not support petitioner's claims that the jury were prejudiced towards him by exposure to reports of his previous activities unrelated to the charges for which he was convicted.[4] Upon becoming aware that certain prospective jurors had read some news stories relating to petitioner, the trial judge conducted a careful *voir dire* examination of each prospective juror

[4]The purported grounds of bias of various jurors (Pet. App. D) are irrelevant. As the court of appeals stated, these contentions approach the frivolous, if not the ridiculous (Pet. App. A, p. 17).

in chambers. None of the jurors ultimately selected recalled any details of the news accounts, and each assured the court that he could render a fair and impartial verdict (Tr. 1-39). Given this careful examination by the court, trial counsel's failure to submit questions to the court for *voir dire* in no way indicated his ineffectiveness. Similarly, inadequate representation cannot be inferred from counsel's failure to challenge any jurors for cause, especially since he carefully exercised his preemptory challenges (Tr. 39).

3. Contrary to petitioner's assertion (Pet. 9), counsel's failure to object to the introduction of certain documentary evidence does not demonstrate his incompetence. When questioned as to his motivation for not objecting, trial counsel informed the court that during the previous trial of the case, he had determined that there was "nothing in the documents [which was] offensive" (Tr. 101). Such tactical decisions made by an attorney during the course of a trial are not ordinarily subject to review on appeal. See, *e.g.*, *United States ex rel. Walker* v. *Henderson, supra; United States* v. *Grant*, 489 F. 2d 27 (C.A. 8). Counsel's concern with the faithful representation of the interest of his client involves highly practical considerations, as well as knowledge of substantive law. The interests of the accused are not necessarily advanced by delaying tactics that do not advance the ultimate resolution of guilt or innocence. *Tollett* v. *Henderson*, 411 U.S. 258, 268. Thus, counsel's failure to object to the introduction of these exhibits offers no ground for relief.

4. During the trial, the defense was unable to locate Jan Hamer, an allegedly favorable potential witness. Petitioner contends (Pet. 10) that his inability to subpoena Hamer was attributable to a prejudicial pre-indictment

delay, which requires dismissal of these charges, and that the present availability of the witness warrants a new trial upon the basis of newly discovered evidence. Petitioner also claims that his defense counsel's failure to prevail on either of these theories, both at trial and on appeal, demonstrates the ineffectiveness of his assistance.

Petitioner's allegation (Pet. 9-10) of an unreasonable pre-indictment delay in violation of the Due Process Clause is groundless. As petitioner's own allegations show (Pet. App. B), the delay was due to a continuing investigation of his fraudulent dealings. Since the prosecution was initiated within the period of the statute of limitations, the delay is not of constitutional proportion unless petitioner establishes that the delay resulted from intentional government misbehavior designed to obtain a tactical advantage or produce prejudice. *United States* v. *Marion,* 404 U.S. 307; *United States* v. *Jackson,* 504 F. 2d 337 (C.A. 8), certiorari denied, 420 U.S. 964. Absent such a showing, this claim does not warrant further review.

Petitioner's only claim of prejudice arises from the inability of the defense to subpoena a witness. But according to Hamer's affidavit (Pet. App. G, p. 60), she was present at her residence immediately preceding and following the trial but could not be reached there during the trial, which was when the defense attempted to subpoena her as a witness. Since the witness was available except for a relatively brief period, the pre-indictment delay was entirely irrelevant and could not have prejudiced the defense or have been a device employed by the prosecution to gain a tactical advantage. *United States* v. *Marion, supra;* see *United States* v. *Andros,* 484 F. 2d 531, 533 (C.A. 9).

Moreover, it is evident from the affidavit itself that the trial court properly denied petitioner's motion for a new trial. The witness's prospective testimony was aimed at

impeaching the credibility of the four former office assistants who appeared as prosecution witnesses. But Hamer's affidavit merely speculates that if petitioner had instructed them to prepare fraudulent bills, she would have heard them discuss his scheme. The proffered testimony falls far short of establishing grounds for a new trial, and counsel's failure to prevail on this motion therefore does not demonstrate ineffective assistance. See, *e.g., United States* v. *Craft,* 421 F. 2d 693, 695 (C.A. 9).

5. The record reveals that trial counsel conducted an extensive cross-examination of the government's witnesses, developed a plausible theory of defense supported by a parade of witnesses, and effectively summarized the evidence and his theory of the case during final argument. Despite petitioner's bald assertions, the petitioner does not allege, and the record fails to disclose, any potentially exonerating defenses that were not thoroughly explored or any exculpatory evidence that was not presented to the jury. Throughout the trial, defense counsel rendered the reasonably effective assistance demanded of an attorney of ordinary skill and training in criminal law. See, *McMann* v. *Richardson, supra,* 397 U.S. at 770-771; *Beasley* v. *United States, supra,* 491 F. 2d at 696.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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